

OBA Charity and Not-for-Profit Section September 12, 2011

Charity and Not-for-Profit Law: What Happened Over
the Summer?
An update on interesting cases and developments
for the
Charities and Not-for-Profit Law Practitioner

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OVERVIEW

- Update on developments concerning charities and not-for-profits since April 2011
 - Corporate Update
 - 2011 Federal Budget
 - CRA Publications
 - CRA Technicals concerning NPOs
 - CRA Technicals concerning Charities
 - Other publications
 - Anti-spam Legislation
 - Recent Cases



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A. Corporate Update

1. New Ontario Not-for-Profit Corporations Act Status
 - *Not-for-Profit Corporations Act*, 2010, S.O. 2010, c. 15 (the "ONCA")
 - Passed 2010, but not yet proclaimed in effect



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• **Establishment and mandate of Advisory Committee**

- Two ministries responsible for Act (MGS – search and filing – MCS everything else, including policy and interpretation)
- Other involved ministries (AG-PGT, MCI-Voluntary Sector Relations)
- Other organizations – OBA (Business Law and CNFP), ONN, LSUC, Centre for Social Innovation, Community Legal Education Ontario (“CLEO”), Ontario Trillium Foundation, Certified General Accountants Association of Ontario (“CGAO), Certified Management Accountants of Ontario (“CMAO”), Institute of Chartered Accountants of Ontario (“ICAO”), Institute of Law Clerks of Ontario, Paralegal Society of Ontario, Canadian Society of Association Executives (“CSAE”)



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• **Progress**

- One Plenary session
- One Special session (OBA, ONN, Trillium, CSAE + Ministries)
- Next meeting in October
- Open – no confidentiality



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• **Work Product**

- Plain Language Guide to cover four areas – originally were to be four guides, now to be consolidated – Incorporation, Transition, Directors and Officers and Members
- Default by-law or by-laws – not sure if will be separate for PBC's / non-PBC's
- Updated Not-For-Profit Incorporator's Handbook – existing version (prepared jointly by the Companies and Personal Property Security Branch of MGS and PGT's Office)
- Regulations – both MGS and MCS



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• **Timelines**

- Plain Language Guides – outlines already reviewed and commented on. Completed draft for comment January 2012
- Default By-laws – draft for comment January 2012
- Not-For-Profit Incorporator’s Handbook – Late 2011
- Other draft MGS materials, such as information sheets – throughout late 2011 to 2012
- Regulations – MCS and MGS regulations – general release in draft on Regulatory Registry for comment – January to March 2012 – Advisory Committee will not see prior to this and will meet during the consultation period
- Proclamation – late 2012 – need upgraded computer systems



• **What’s still not clear**

- PGT position and requirements
- Discretion exercised in Regulations – e.g., change audit limits
- Possible statutory amendments
- Possible need to amend Letters Patent before new Act in effect – administrative position

• **MCS Website**

- Modernizing the Not-for-Profit Sector
- http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx



2. New Canada Not-for-Profit Corporations Act (CNCA)

- There have been several attempts at legislative reform to the *Canada Corporations Act*
- On June 23, 2009, CNCA received Royal Assent, but has not yet been proclaimed in force
- Estimated that CNCA will likely come into force in late fall 2011
- CCA corporations will have three years to continue under CNCA



B. FEDERAL BUDGET 2011

- The 2011 Federal Budget initially introduced on March 22, 2011
- Budget died on the order paper with the vote of non-confidence on March 25, 2011
- Reintroduced and tabled on June 6, 2011, and was passed on June 7, 2011
- June Budget is the same as the March Budget with a few changes
- Budget contains significant changes to the regulation of charities and other qualified donees
- CBA submission in August, 2011
- CRA comment on the rules in the Budget (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/bdqtgts/2011/menu-eng.html>)

1. New Regulatory Regime For Qualified Donees (QDs)

- The Budget extends to the following types of QDs certain regulatory requirements that currently apply only to registered charities
 - Registered Canadian amateur athletic associations
 - Municipalities in Canada
 - Municipal and public bodies performing a function of government in Canada
 - Housing corporations in Canada constituted exclusively to provide low-cost housing for the aged
 - Prescribed universities
 - Charitable organizations outside of Canada that have received a gift from the federal government

- Proposed requirements to apply to QDs listed above
 - QDs will be identified in a publicly available list maintained by CRA
 - Suspension of receipting privileges or revocation of QD status for failure to
 - Properly issue donation receipts
 - Maintain proper books and records
 - Monetary penalties for improper issuance of receipts or failure to file annual returns
- Registered national arts service organizations are deemed to be "registered charities" and are subject to the requirements that apply to registered charities
- Effective later of January 1, 2012, and the date of Royal Assent for the enacting legislation

- Proposed additional regulatory requirements to RCAAs
 - Promotion of amateur athletics in Canada on a nation-wide basis as their *exclusive* purpose and *exclusive* function
 - monetary penalties, suspension of its receipting privileges, or revocation if an RCAA provides an undue benefit to any person (e.g., excessive compensation)
 - CRA may make available to the public certain information and documents in respect of RCAAs

2. New Governance Regime For Registered Charities And RCAAs

- CRA may refuse or revoke the registration of a charity or a RCAA or suspend its authority to issue official donation receipts, if a member of the board of directors, a trustee, officer or equivalent official, or any individual who otherwise controls or manages the operation of the charity or RCAA (ineligible individuals)
 - Relevant criminal offence - found guilty of a criminal offence in Canada or similar offence outside of Canada relating to financial dishonesty (including tax evasion, theft or fraud), or any other criminal offence that is relevant to the operation of the organization, for which he or she has not received a pardon

- Relevant offence - found guilty of an offence in Canada within the past five years (other than a relevant criminal offence), or similar offence committed outside Canada within the past five years relating to financial dishonesty (including offences under charitable fundraising legislation, convictions for misrepresentation under consumer protection legislation or convictions under securities legislation) or any other offence that is relevant to the operation of the charity or RCAA

- Has been a member of the board of directors, a trustee, officer or equivalent official, or an individual who otherwise controlled or managed the operation of a charity or RCAA during a period in which the organization engaged in serious non-compliance for which its registration has been revoked within the past five years
- Has been at any time a promoter of a gifting arrangement or other tax shelter in which a charity or RCAA participated and the registration of the charity or RCAA has been revoked within the past five years for reasons that included or were related to its participation

- Effective later of January 1, 2012, and Royal Assent of the enacting legislation
- CRA will look at the particular circumstances of a charity or RCAA but does not state what those circumstances are
- Question - due diligence required to ensure that an "ineligible individual" does not become involved – questionnaire?

3. Recovery Of Tax Assistance For Returned Gifts

- CRA will be able to reassess a taxpayer outside the normal reassessment period and disallow a taxpayer's claim for a credit or deduction in any situation where the gifted property is returned to a donor
- Where a QD issued an official donation receipt in respect of a gift of property and subsequently returns that property, if the value of the property is greater than \$50, the QD must issue a revised donation receipt and file a copy with CRA
- Effective for gifts returned on or after March 22, 2011
- Budget did not address whether a gift can be returned at common law

4. Gifts of Non-qualifying Securities (NQS)

- An NQS is generally a share, a debt obligation, or other security issued by a taxpayer, but does not include publicly listed securities and deposit obligations of financial institutions
- NQS rules currently apply to donations to private foundations and charities not at arm's length to donor
- Budget extends rules to gifts of NQS to all registered charities and to defer tax recognition until the recipient charity disposes of the NQS to a third party for consideration
- The Budget also proposed new anti-avoidance rules
- Effective for securities disposed of by donees on or after the March 22, 2011



5. Granting Of Options To QDs

- Currently, where a donor granted an option to purchase property to a qualified donee, the gift was recognized on the date of the gift for the fair market value of the option and a receipt could be issued immediately
- Budget proposes to delay this until the option is exercised by the qualified donee
- Taxpayer will be allowed a credit/ deduction at the time of acquisition by the donee based on the amount by which the fair market value of the property at that time exceeds the total of amounts paid by the donee
- New rules to coincide with proposed split-receipting rules
- Effective for options granted on or after March 22, 2011



6. Donations of Flow-through Shares (FTS)

- Since the elimination by the 2006 Budget of the tax on capital gains accruing on donations of publicly-traded securities to registered charities, donation tax shelter structures involving gifts of FTS have increased
- A taxpayer can acquire FTS issued by corporations in the oil and gas, mining and renewable energy fields and claim "flow-through" income tax deductions of certain expenses
- As deductions are claimed, the adjusted cost base of the shares is reduced (usually to nil) such that when the FTS are sold, the full sale proceeds are taxed as a capital gain



- If, instead, the FTS are donated to charity, the taxpayer gets the benefit of a tax credit/deduction and can also claim exemption from capital gains tax on the disposition
- The combined effect substantially reduces or virtually eliminates the after-tax cost of making a donation
- The Budget proposes to limit the exemption from tax on the capital gain in relation to donation of FTS to the extent that the cumulative capital gains in respect of the gift exceeds the original cost of the FTS
- The Budget also contains anti-avoidance provisions
- Effective for shares issued pursuant to a flow-through share agreement entered into on or after March 22, 2011

7. Supporting Social Partnerships and Study of Charitable Donation Incentives

- Budget states that the Government will encourage the development of government/community partnerships enabling communities to tackle local challenges and test new approaches to improve performance
- Motion 559, which was sponsored by the MP for Kitchener-Waterloo on March 22, 2011, was adopted by the House of Commons and is now being supported by the government. The Motion calls for the House Standing Committee on Finance to study charitable donation incentives

C. PUBLICATIONS FROM CRA

1. New CRA Guidance on Working With an Intermediary Within Canada
 - On June 20, 2011, CRA released Guidance CG-004, *Using an Intermediary to Carry out a Charity's Activities within Canada* (<http://www.cra-arc.gc.ca/chrts-qvng/chrts/plcy/cgd/ntrmdry-eng.html>)
 - Guidance assists charities who are or intend to conduct charitable activities through an intermediary within Canada
 - Complements Guidance CG-002, *Canadian Registered Charities Carrying out Activities Outside of Canada*

2. New Guidance on the Promotion of Animal Welfare and Charitable Registration

- August 19, 2011, CRA released the Guidance on the Promotion of Animal Welfare and Charitable Registration (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nmlwlfreng.html>)
- The Guidance sets out guidelines on promoting the welfare of animals and charitable registration
- Focus at common law is on what is for the benefit of humans rather than what is for the benefit of animals

3. Technical Interpretations on Non-Profit Organizations (NPOs)

- CRA document number 2010-038058117
 - Reviews NPO Requirements
 - An organization with exclusively charitable purposes does not qualify as an NPO, even if it is not a registered charity
 - The NPO status of an organization must generally be reviewed on a year by year basis.
 - Any purpose other than profit – need not be "benevolent" or "social"

- CRA document number 2010-038058117
con'd

- Incidental profits permitted – clarified position
 - Incidental profits permitted from activities that are undertaken to meet the organization's not-for-profit objectives
 - Earning profits to fund not-for-profit objectives is **not** considered to be itself a not-for-profit objective
 - Fund capital projects and establish (reasonable) operating reserves from capital contributed by members, from gifts and grants, or from accumulated, incidental profits

- CRA document number 2010- 0389161E5
 - Payments to student members for child care expenses
 - CRA found that that the payments made by the organization were most likely ‘social assistance’ payments.
 - If income available for the personal benefit of members – will not qualify as NPO
 - CRA did not specifically comment on the status of this organization

- CRA document number 2010-037956117
 - Condominium operating a golf course, pro shop and restaurant
 - Condo did not qualify because golf course was operated with a profit motive and income of the condo was available to its members
 - Golf course profit was more than incidental
 - Shareholder benefit issue

- CRA document number 2010-0380451E5
 - Condo solar panels – Ontario “Feed in Tariff” program
 - Revenues used by the condo to cover general operational and financing costs – normally covered by members’ fees
 - CRA stated this activity may be connected to the not-for-profit objectives of the condo

- CRA document number 2011-040554117
 - Condo cell tower lease
 - If provincial condo legislation supports that common area rented out belongs to unit owners, then the rental income belongs to the owners and the is considered to be an agent for the owners
 - NPO status not jeopardized if rent is incidental

- CRA document number 2011-0397881E5
 - Shareholders' cottages built on property of corporation
 - Corporation's objects are to purchase, maintain and manage property for use by its shareholders
 - Corporation may make payments to shareholders on gains of sale of cottages without jeopardizing its NPO status

- CRA document number 2011-039498117
 - Co-op housing operating under a particular agreement with the Canada Mortgage and Housing Corporation (CMHC)
 - Generally, housing co-ops do not qualify as NPOs - usually required to make surplus available to members by way of allocations commonly referred to as patronage dividends

- CRA document number 2011-039866
 - Educational institution earning a profit
 - Organization did not qualify because it appeared to have a profit purpose and income had been made available for the personal benefit of one of its members
 - Possibly charitable as well

- CRA document number 2011-039425117
 - Retail operations
 - Organization did not qualify
 - *Canadian Bar Insurance Association* reasoning distinguished

4. Technical Interpretations on Charities and Gifts

- CRA document number 2010-038401
 - Whether a charity can issue T2202A Tuition, Education and Textbook Amount Certificates
- CRA document number 2011-0405881E5
 - Gifts to a public body performing a function of government in Canada
 - Must retain discretion regarding how funds are spent – cannot be a conduit

- CRA document number 2009-033887
 - Split-receipted ecological gift of a servitude
- CRA document number 2011-0399551M4
 - Deduction for vow of perpetual poverty available to ALL religious orders (not just Christian orders)

5. Other CRA publications and initiatives

- Charities Connection No. 6 in May
 - New reference numbers for guidance products
- Charities Connection No. 7 in June
 - Updates on the 2011 Budget
 - Reminder to file T3010 return
- Charities Connection No. 8 in August
 - Information on golf tournaments as a fundraiser, e.g., tax receipts, split receipting, corporate purchases and sponsorships, third party fundraisers

- East Africa Drought Relief Fund (Fund)
 - See <http://www.cra-arc.gc.ca/chrts-gvng/chrts/dragtriffnd-eng.html> and Charities Connection No. 8
- CRA service standards
 - See http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/tlphn_srvc-eng.html
- Public Service Body GST/HST Info Sheet
 - See <http://www.cra-arc.gc.ca/E/pub/gi/gi-121/README.html>
- Gifts to Certain Charitable Organizations Outside Canada, effective May 5, 2011 (<http://www.cra-arc.gc.ca/E/pub/tp/ic84-3r6/README.html>)

D. ANTI-SPAM LEGISLATION UPDATE

- Bill C-28 creates a new regulatory scheme for spam and unsolicited electronic messages, received Royal Assent on December 14, 2010, not expected to be in force until early 2012
- Broad definitions of "electronic message" and "commercial activity" and will include charities
- Prohibits sending an electronic message without the express or implied consent of the recipient
- A two year limitation on implied consent can arise from: a donation or gift made to a charity; membership or volunteering in a charity or non-profit

- Significant monetary penalties, which can include a maximum fine of \$10,000,000
- June 30, 2011, CRTC released draft regulations for consultation (<http://crtc.gc.ca/eng/archive/2011/2011-400.htm>)
- July 9, 2011, Industry Canada released draft regulations which were published in the Canada Gazette, Part I for consultation (<http://www.gazette.gc.ca/rp-pr/p1/2011/2011-07-09/html/reg1-eng.html>)
- Whereas the CRTC Regulations outlined the form and content for compliance purposes, the IC Regulations add clarity to certain terms contained in the Anti-spam Legislation

E. RECENT CASES

1. News to You Canada v. Minister of National Revenue (2011 FCA 192)
 - On June 7, 2011 the Federal Court of Appeal released its ruling in that "dissemination of news" is not charitable
 - One of the corporate objects is to research and produce in-depth news and public affairs programs to provide unbiased and objective information concerning significant issues and current events that are relevant to a large sector of the general public and to disseminate these programs in order to encourage a well-informed general public for the benefit of society

- CRA refused its application for charitable registration and this refusal was confirmed following an Objection
- The organization appealed on the basis that its purposes fell within two heads of charity, the advancement of education and other purposes beneficial to the community as a whole in a way which the law regards as charitable
- Advancement of education - the Court determined that while the production and dissemination of in-depth news and public affairs programs may improve the sum of communicable knowledge about current affairs, such activities are not sufficiently structured to meet the test established in Vancouver Society

- Fourth head - the Court reviewed the decision in Native Communications and concluded that the mere dissemination of news was not charitable at law - in part because the organization identified its audience as the general public and not any group or community in need of charitable assistance
- Court held in order to be charitable, the organization's purposes must be of special benefit to the community, with an eye to society's current social, moral, and economic context
- The Court did not accept the organization's argument that presenting the news in an "unbiased and objective" form met this requirement

2. Rasouli v. Sunnybrook Health Sciences Centre, 2011 ONCA 482 (June 29, 2011)

- Court of Appeal decision on withdrawing life support
- The Ontario Court of Appeal decided that doctors must obtain the consent of the substitute decision maker to withdraw life support and move the patient to palliative care, failing which the doctors' proposed action must be referred for determination to the Consent and Capacity Board, established under the Ontario Health Care Consent Act
- The judgment will be of particular interest to hospitals and other health care charities, as well as many religious charities

3. Tax preparer found guilty of fraud in charitable donations scheme (<http://www.cra-arc.gc.ca/nwsrm/cnvctns/on/on110617-eng.html>)

- On June 8, 2011, CRA announced that Eric Armah who plead guilty in the Ontario Court of Justice in Brampton on April 29, 2011, for one count of fraud over \$5,000 for setting up false charitable donation claims has been sentenced to three years imprisonment

4. Student Vote v. Learning Support Council, 2011 ONSC 2482 (CanLII)

- On April 27, 2011 Ontario Superior Court of Justice
- A for-profit partnership operating as Student Vote raised donations for a charity initially without a written agreement, but then entered into an agency agreement with the charity in 2005
- The charity terminated the agency agreement two months before it was to expire, with \$95,408 being held in a segregated bank account
- Student Vote alleged that those funds were held in trust and wanted the undistributed funds returned

- The court dismissed Student Vote's claim with respect to the undistributed funds, but permitting the action to proceed on the alternative grounds of seeking damages for breach of contract
- The court cited affidavit evidence from the president of the charity, which noted that the charity, as fiduciary of the monies donated to it, is responsible to account to the public for all such monies raised, and consequently would not have agreed to hold in trust such donations on behalf of Student Vote

5. Wang v. Canada (Citizen and Immigration), 2011 FC 614

- On May 26, 2011, the Federal Court upheld the decision of the Refugee Protection Division of the Immigration and Refugee Board that the applicant's refugee claim failed because his claims alleging that he had attended an underground Christian Church in China and was wanted by the Public Security Bureau (PSB) were not credible
- In China, all Christian religious activities must take place only within government controlled churches. Members of house churches or underground churches, that operate outside the regulated churches, are subject to arrest, imprisonment and other punishment

- The applicant claimed that he began attending a house church in China in 2004 and was often a lookout during services. He filed a claim for refugee status after learning from his wife in China that the PSB had come to their home because of the alleged illegal activities of his church and that some members of his church had been arrested and imprisoned
- The Federal Court agreed with the Board that the claimant had not adequately proven the sincerity of his religious beliefs

6. Huang v. 1233065 Ontario 2011 HRTO 825 (CanLII)

- Human Rights Tribunal of Ontario decision, April 27, 2011
- Whether the practice of Falun Gong was a "creed" within the meaning of the Ontario Human Rights Code, and whether the organization discriminated against the complainant in the provision of a "service" under the Code by revoking her membership on the basis of her being a Falun Gong practitioner
- Tribunal has no authority to determine whether or not a belief system is reasonable, whether it would withstand scientific scrutiny, or whether its beliefs are consistent with the values contained in the Canadian Charter of Rights and Freedoms

7. Bentley v. Anglican Synod of the Diocese of New Westminster [2010 BCCA 506]

- On June 16, 2011, the Supreme Court of Canada has refused to grant leave to appeal by four break-away Anglican parishes from the B.C. Court of Appeal's decision
- The court did not provide reasons for the refusal
